

EXHIBIT H

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF HAWAII

3

4 WAYNE BERRY, a Hawaii citizen,) CIVIL NO. CV03-00385
5) SOM LEK
6 Plaintiff,) (Copyright)
7)
8 vs.)
9 HAWAIIAN EXPRESS)
10 SERVICE, INC., a)
11 California corporation,)
12 et al.,)
13 Defendants.)
14 _____)

ORIGINAL

13 DEPOSITION OF THOMAS UENO, CPA

14 Taken on behalf of Defendant Post-Confirmation Trust
15 at the offices of Kobayashi Sugita & Goda, 999 Bishop
16 Street, Suite 2600, Honolulu, Hawaii, 96813,
17 commencing at 10:11 a.m. on Monday, January 23, 2006.

18

19 REPORTED BY: JOAN IZUMIGAWA, CSR No. 136

20 Notary Public, State of Hawaii

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1 APPEARANCES:

2 For Plaintiff Wayne Berry, a Hawaii citizen:

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16 Also present: Jeffrey Kinrich
Wayne Berry

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23 Witness address: c/o Timothy J. Hogan, Esq.

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THOMAS UENO, CPA

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Being first duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

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EXAMINATION

6

BY MR. LIEBELE:

7

Q. Mr. Ueno, I'm Eric Liebeler. I know you've been deposed many times before so I'm just going to give you one admonition, and that is this: If you don't understand any of my questions over the course of the deposition this morning, will you tell me that, please.

13

A. Yes.

14

Q. Now, you wrote a supplemental report that you finished on December the 27th of 2005; is that right, sir?

17

A. That's correct.

18

Q. And -- let's just give you a copy. Do you have a copy of that with you, sir?

20

A. Yes, I do.

21

O. Okay. Where is it?

22

I'm just going to -- I can just give you this copy. We can use that, as well. And you have the exhibits with it, as well?

25

A. No. I did not bring the exhibits with that.

1 Q. Okay. I've got what was produced to me as
2 the exhibits, so let me give you what I've got as
3 Trial Exhibit 93 along with the exhibits and just
4 have you identify that as your December 27th report,
5 sir.

6 A. Yes, it is.

7 Q. So Trial Exhibit 93 is your supplemental
8 report; is that right, sir?

9 A. Yes, it is.

10 Q. Do the attached exhibits look like the
11 exhibits that you had attached to your report?

12 MR. HOGAN: I'm just going to state an
13 objection that it's voluminous. Let the record
14 reflect it's voluminous, and obviously for him to go
15 through it line by line would not be possible in the
16 time we have.

17 Q. BY MR. LIEBELER: Just look at the face page
18 of each exhibit and -- I've included faithfully all
19 of the things that were produced to me. I just want
20 you to look at each face page and make sure that
21 they're in general the exhibits that were attached to
22 this report.

23 A. In general they are.

24 Q. Now, in your report you have indicated --
25 and I'm on the first page of Trial Exhibit 93. 93,

1 first page. You have said, "I prepared these
2 supplemental opinions based on new information that
3 was made available to me."

4 A. That's correct.

5 Q. What new information was made available to
6 you did you use to prepare these reports?

7 A. Mr. Hogan gave me a disk full of records,
8 and the records are the ones that you're referring to
9 in the exhibits and --

10 Q. Was there anything on that disk other than
11 the exhibits that are attached to your report, sir?

12 A. Other than the information for the exhibits
13 in our report, no.

14 Q. Where is that disk now, sir?

15 A. Okay. What I've produced here is a copy of
16 the information that was given to us.

17 Q. Okay. So the disk that you're showing me is
18 in fact a copy of the disk that was given to you by
19 Mr. Hogan; is that --

20 A. It's a copy of the information --

21 Q. -- right, sir?

22 A. Yeah, he -- what he did was e-mail it to us
23 and so we downloaded it to a disk for you.

24 Q. Was there a cover e-mail along with that
25 information? You know, "Dear Mr. Ueno: Here is some

1 more information for you. Sincerely, Tim"? That kind
2 of thing?

3 A. Without the "sincerely," yes.

4 Q. Where is that e-mail?

5 A. Gee. I'm not sure whether it's on there or
6 not. It could be on there.

7 Q. So as of now you don't know exactly where it
8 is, but it might be on the disk you just gave me.
9 Fair?

10 A. Yes, because I asked my staff to copy all
11 the e-mails and that file, and so I'm assuming it's
12 there.

13 Q. Do you have hard copies of that information
14 with you here today, sir?

15 A. No, I don't.

16 Q. I'm going to write on this "Produced by
17 Mr. Ueno at 1/23/05 deposition."

18 MR. HOGAN: I don't know what's on that
19 disk. I don't -- so I can't tell you what --

20 MR. LIEBELEER: I understand. I'm just
21 saying "produced." I'd like you to initial that,
22 Mr. Hogan, just --

23 MR. HOGAN: I'm not here to be an exhibit --
24 I understand.

25 MR. LIEBELEER: That's fine.

1 question to Mr. Hogan or Mr. Berry?

2 A. Which specific question?

3 Q. The specific question about whether or not
4 the \$2.7 million number was actually collected by
5 Fleming.

6 A. No. We don't ask that kind of questions.
7 We do it in our analyses.

8 Q. So the answer is: No, you didn't ask that
9 question?

10 MR. HOGAN: Objection. Misstates his
11 testimony.

12 A. That's correct.

13 Q. BY MR. LIEBELER: Thank you.

14 Did you do any analysis, sir, to determine
15 what, if any, expenses Fleming would have in earning
16 that \$2.7 million number?

17 A. We did some analyses on that.

18 Q. Okay. What analysis did you do?

19 A. We looked at the -- some of the costs -- or
20 the costs of the logistics department.

21 Q. What other analysis did you do, sir?

22 A. Well, that was about the type of information
23 that we've had. So we looked at that.

24 Q. Other than looking at the costs of the
25 logistics department specifically, did you do

1 anything else to try to determine what expenses were
2 associated with that \$2.7 million billing number?

3 A. I looked at whatever information that we had
4 available to us, and that was the only type of costs
5 that I could specifically identify.

6 Q. Did you actually look at the P&L's from the
7 Hawaii division for that period of time, sir?

8 MR. HOGAN: Objection. Vague as to what
9 "P&L" means.

10 A. As we sit here now, I don't recall
11 specifically.

12 Q. BY MR. LIEBELER: Okay. Let's take a look
13 at what has been marked elsewhere as Trial Exhibit
14 202. I may need to get Mr. Capozzola to confirm that
15 for me.

16 MR. LIEBELER: Mr. Berry, you need to leave,
17 please. This is a counsel-only document so I -- I
18 mean, I don't know how we're going to deal with this
19 at trial, but for the moment, at least, it's covered
20 by the counsel-only protective order.

21 MR. BERRY: Do you want me to skip this and
22 go back to the office?

23 MR. HOGAN: Yeah. You can go back. That's
24 fine.

25 (Mr. Berry left the deposition.)

1 Q. BY MR. LIEBELER: Let me give you that.

2 MR. LIEBELER: Let me find out what the
3 trial exhibit numbers are.

4 (Discussion off the record.)

5 Q. BY MR. LIEBELER: Is that a document you
6 ever looked at before, sir?

7 A. I can barely see it, I'm sorry. Do you have
8 a bigger copy of this?

9 Q. No.

10 A. Oh. I really am having a hard time seeing
11 it. I'm sorry, but I'm having a hard time reading
12 it.

13 Q. This is the only copy that we have. It's
14 how it's been produced to me and how we've been using
15 it over the course of this case.

16 MR. HOGAN: I'll state a
17 mischaracterization: that this isn't, I don't
18 believe, the way that they were produced to us. I
19 don't have them with me, but I don't believe that.

20 MR. LIEBELER: It's the only copy I've ever
21 seen so --

22 MR. HOGAN: I'm not disputing that so --

23 MR. LIEBELER: Got it.

24 A. Your question again?

25 Q. BY MR. LIEBELER: Have you ever seen this

1 financial statement before?

2 A. I don't think so.

3 (Discussion off the record.)

4 Q. BY MR. LIEBELER: Did you ever examine, sir,
5 the financial statements that Mr. Kinrich relied on
6 for purposes of his opinion?

7 MR. HOGAN: Objection. Calls for
8 speculation. Lacks personal knowledge.

9 Q. BY MR. LIEBELER: Did you ever examine,
10 sir --

11 MR. HOGAN: No. How can he tell what your
12 expert examined?

13 MR. LIEBELER: Because it's in his report
14 and he read my expert's report, Tim.

15 MR. HOGAN: I believe he already submitted a
16 declaration that he had a different set of documents
17 than your expert.

18 MR. LIEBELER: Fine. Fine.

19 Q. BY MR. LIEBELER: Go ahead and answer, sir.

20 A. I've looked at those reports that were
21 attached.

22 Q. Is this one of those documents, to the best
23 of your recollection, 202?

24 MR. LIEBELER: Let the record reflect that
25 I've given Mr. Ueno what has been marked in the trial

1 exhibit list as Exhibit 202, and that's what he's
2 looking at now.

3 MR. HOGAN: Let the record reflect that you
4 didn't use the trial exhibits in the deposition
5 so it's -- unless counsel is going to testify and
6 authenticate them at the trial, we'll just have to
7 take your word for it.

8 MR. LIEBELEER: Fine. Whatever.

9 A. You know, there are -- there are many
10 different reports in here and -- there are just
11 several -- there are lots of reports in here.

12 Q. BY MR. LIEBELEER: So you don't know whether
13 or not you've ever seen that before, sir?

14 A. I -- I haven't seen these.

15 Q. Have or have not, sir?

16 A. I have not seen these.

17 Q. Very good. If you haven't seen it, then why
18 don't you go ahead and give it back to me. Or you
19 can keep it. I don't care. It doesn't matter.

20 A. No, I'm just flipping through it to see what
21 type of reports these are.

22 Q. That's fine.

23 MR. HOGAN: Just so the record is clear, I
24 believe the reports that were provided in
25 Mr. Kinrich's report did not have Bate stamps. The

1 ones that you have in front of you now are Bate
2 stamped.

3 A. I don't believe I've seen these reports.

4 Q. BY MR. LIEBELER: You don't believe you've
5 seen those before, sir?

6 A. Uh-uh. No. I don't believe I've seen this
7 before.

8 Q. Why don't you flip through the rest of it
9 just to make sure.

10 A. No.

11 Q. You've not seen that?

12 A. I don't believe so.

13 Q. What were the amount of expenses that you
14 determined, if any, were associated with the \$2.7
15 million number in the first paragraph of your "Total
16 Invoices to 3rd Parties" section of your report, sir?

17 A. I guess when you look at the work that was
18 done -- or the e-mail that we received from -- Let's
19 see -- Teresa Noa, I think we came up with a number
20 of \$262,000.

21 Q. What e-mail specifically are you referring
22 to, sir? Give me the date on it, if you would be so
23 kind.

24 A. Excuse me.

25 Q. Sure.

1 A. April 3rd, 2003.

2 Q. Other than that e-mail, did you look at any
3 other expense information associated with that \$2.761
4 million in revenue, sir?

5 A. We looked at -- again, we looked at the
6 financial information that we had available.

7 Q. All right. Let's take a look at the next
8 paragraph of your report, and that's the one
9 beginning, "I used Fleming's Excel file named
10 'Logistics Data' dot 'Org,' worksheets 'Orders' and
11 'Invoices.'" You see that paragraph, sir?

12 A. Yes, I do.

13 Q. Now, the last sentence in that paragraph
14 reads, "This assumption was confirmed by agreeing the
15 weight and cube of the individual items across both
16 worksheets."

17 A. That's correct.

18 Q. What does that mean, sir?

19 A. Oh. We were looking at the worksheets, and
20 basically we looked at the worksheets for the order
21 versus the worksheets for the billings, the
22 invoices --

23 Q. Which exhibits are those to your
24 supplemental report, sir?

25 A. Let's see.

1 analysis, okay? After he did that analysis, he said,
2 "Mr. Ueno, I've done that analysis. Here is what I
3 did. Here is how I did it. Check me off on it," and
4 you did. Have I got it right?

5 A. That's correct.

6 Q. You didn't do any of the individual checking
7 of the line items across the worksheet? That was
8 Mr. Hoe's job, correct?

9 MR. HOGAN: Objection. Misstates testimony.

10 A. Okay. Did I do any of it? Is that your --
11 is that the point you're making?

12 Q. BY MR. LIEBELER: Did you check any of the
13 individual line items? Did you yourself do that?

14 A. Did I check any of the individual --

15 Q. Yes.

16 A. Yes, I did individual --

17 Q. I thought you told me Mr. Hoe did that and
18 then he showed you what he had done.

19 MR. HOGAN: Objection. Misstates testimony.

20 A. Okay. I believe that when you -- if you use
21 the word "checking," I believe that if I looked at
22 what he did and looked at a specific item -- specific
23 line item that that's considered part of checking.

24 Now, you may not consider that part of checking. And
25 so -- so that's what -- that's where the -- I just

1 want to make sure that we're clear as to what we're
2 saying. That's it.

3 Q. BY MR. LIEBELER: How many different
4 individual items were there that were confirmed
5 across the 2 separate worksheets, sir?

6 A. Oh, I don't know exactly how many.

7 Q. Can you estimate it for me.

8 A. Well, I would say that he looked at the
9 1500, and I'm not sure how many specifically he
10 looked at individually.

11 Q. But there were 1500 items that he was
12 responsible for checking off across the 2
13 spreadsheets; is that right?

14 A. That's correct.

15 Q. You don't know how many Mr. Hoe actually
16 looked at; isn't that right, sir?

17 A. No, I don't.

18 Q. He showed you what he had done, and how many
19 did you specifically look at as examples that he had
20 done?

21 A. Specifically?

22 Q. Yes.

23 A. Not more than half a dozen.

24 Q. So out of 1500 potential items, you yourself
25 looked at no more than 6. Fair?

1 A. That's correct.

2 Q. Looking at the next paragraph, you are
3 essentially looking for the same items on the orders
4 worksheet and the invoices worksheet, correct?

5 A. That's correct.

6 Q. You did that by looking at the order ID and
7 the job ID to confirm that those reflected the same
8 shipment; is that right?

9 A. That's correct.

10 Q. Again, who was it that actually did that?

11 Was it Mr. Hoe that went through that process, or was
12 that you along the lines of the same process you
13 articulated to me a minute ago?

14 A. It was along the lines of the same process I
15 articulated earlier.

16 Q. Got it. Which is to say, just to get it
17 right, that Mr. Hoe was the one that did it as an
18 initial matter? He showed you what he had done and
19 showed you some number of specific examples of that
20 cross-checking, right?

21 A. That's correct.

22 Q. How many specific examples of that
23 cross-checking did he show you on this -- on the
24 cross-checking done on this paragraph, sir?

25 A. That he showed me?

1 sir?

2 A. The total amount that we have asked for in
3 terms of the -- no. It does not affect the license
4 fee in terms of the 1,772 times the 1528 containers.
5 No, it does not.

6 Q. It doesn't reflect (sic) the reasonable
7 license fee portion of your opinion, correct, sir?

8 A. That's correct.

9 Q. Does it impact the lost profits or the
10 profits of the infringer portion of your opinion,
11 sir?

12 A. In terms of the profits to the infringer, we
13 still have the same dollar amount of sales that's
14 made during that period, the 55 million. That does
15 not change. It's not affected by this.

16 Q. Now, you're aware, are you not, that in
17 order to bring in that \$55 million, Fleming actually
18 has to pay for the goods that it gets? Right?

19 MR. HOGAN: Objection. Misstates facts not
20 in evidence. Fleming filed bankruptcy.

21 A. Fleming has to pay for the goods that it
22 gets?

23 Q. BY MR. LIEBELER: Yes.

24 A. Normally that's not the way business works.
25 And I believe Fleming, being a very large company,

1 also had credit given to it by its -- by its various
2 vendors, so therefore the amounts were probably
3 obligated through orders. And subsequent, then, when
4 the goods were promptly shipped and they took title
5 to it, that they then picked it up as an accounts
6 payable.

7 And so the reports that we're looking at,
8 I'm assuming that because it's orders and invoices
9 and -- that Fleming does have an accrual basis
10 accounting system that it uses. I'm also assuming
11 that -- because Fleming filed its reports with the
12 SEC, as a result of that that they're using the
13 accrual basis of accounting. So it's not based, as
14 you mentioned, on a cash basis.

15 Q. I didn't say anything about a cash basis in
16 my question, sir.

17 A. Your question refers to, On the basis as --
18 a cash basis is the only time that they would record
19 a cost. The cost is recorded at the time it's
20 accrued.

21 Q. Are there costs associated with this \$55
22 million in sales numbers, sir?

23 A. Are there costs associated with the \$55
24 million in sales? I would think there would be.

25 Q. Do you know what those are, sir?

1 A. There could be various -- you have various
2 types of costs. You have both the direct costs and
3 the indirect costs.

4 Q. Do you know what those costs are, sir, as a
5 dollar value?

6 A. No, I don't.

7 Q. Have you tried to ascertain those?

8 A. I have not, you know, looked at the specific
9 cost items related to that. I've looked at some of
10 the -- the nature of the indirect cost items in
11 there.

12 Q. Have you made an effort to determine the
13 dollar value of the costs associated with that \$55
14 million in sale number, sir?

15 A. No, I have not.

16 Q. It's fair to say that when Fleming buys
17 goods and ships them to Hawaii and turns around and
18 resells them here, it doesn't get those goods for
19 free, does it?

20 MR. HOGAN: Objection. Misstates facts not
21 in evidence. It did on April 1st, 2003.

22 A. Again, it's fair to assume that when someone
23 gets goods that it has to incur some costs for it? I
24 guess you could assume that.

25 Q. BY MR. LIEBELER: That's a fair assumption,

1 isn't it, sir?

2 A. As to whether it's fair or not -- are you
3 saying in general?

4 Q. I'm saying for the Fleming company in the
5 period following April 1st of 2003, sir.

6 A. See, I don't know -- I don't have specific
7 information as to its specific costs so -- I can say
8 that in general it's -- your statement in general is
9 correct.

10 Q. Do you have any reason to believe that after
11 the bankruptcy petition was filed, Fleming got goods
12 for free?

13 A. I don't know.

14 Q. Do you have any basis to assume that, sir?

15 A. I -- I just don't know.

16 Q. Don't know one way or the other?

17 A. I don't know.

18 MR. LIEBELER: Let's take 5 minutes. I
19 don't have a whole lot more to do.

20 (Recess: 11:14 a.m. to 11:24 a.m.)

21 Q. BY MR. LIEBELER: All right. Back on the
22 record.

23 Mr. Ueno, let's go back to the 55,120,183
24 number on Attachment A, page 2 of your report -- of
25 your December 27th report. You see that, sir?

1 A. That's right.

2 Q. Now, you told me -- and that's a net sales
3 number, right?

4 A. That's correct.

5 Q. We talked a little bit about expense
6 information or cost information associated with that.
7 I take it that the \$262,000 of indirect freight
8 department costs does count against that \$55 million
9 number. Right?

10 A. The -- well, all I'm saying is: That is
11 what Teresa Noa estimated as the cost of the
12 logistics department.

13 Q. You have no reason to disagree with that,
14 with her estimate of those costs; is that right?

15 MR. HOGAN: I'm going to object. Vague as
16 to the term and -- the time that that number is based
17 on.

18 A. I have -- all I can say is: That is what
19 Teresa Noa has stated to be the number, okay? And
20 that's it. That's -- I cannot give any opinion as to
21 whether that's -- you know, that's Fleming's numbers
22 or not.

23 Q. BY MR. LIEBELER: You have no basis as you
24 sit here today to disagree with that number on her
25 part? Might be right, might not be right? You just

1 have no view, correct, sir?

2 A. Yeah. Again, I have -- I have -- the only
3 thing I have is what I have in that e-mail, and
4 that's it.

5 Q. You have no independent basis with which to
6 disagree with her assessment of that cost; is that
7 right, sir?

8 A. To disagree? No, I do not have an
9 independent basis to disagree with that cost.

10 Q. Do you have any specific information
11 available to you that would tell you what the costs
12 are associated with the \$55 million net sales number
13 in your report?

14 A. No.

15 MR. LIEBELER: I don't think I have anything
16 further.

17 We've got to put on the record that I've
18 given back to Mr. Hogan copies of the disks that
19 Mr. Ueno produced at the beginning of the deposition.

20 Is that right, Mr. Hogan?

21 MR. HOGAN: Upon that representation, I have
22 2 disks in my hand, and when I get back, I'll take a
23 look and see what they are.

24 MR. LIEBELER: Okay.

25 MR. HOGAN: I have one question --

1 MR. LIEBELER: If they're not --

2 MR. HOGAN: I will call you.

3 MR. LIEBELER: -- let me know.

4 MR. HOGAN: I will actually call you right
5 away.

6 EXAMINATION

7 BY MR. HOGAN:

8 Q. Mr. Ueno, the \$260,000 number that you're
9 talking about, is that an annualized number, or was
10 it based on the period of time that the \$55 million
11 number was based?

12 A. It's an annualized number.

13 Q. The \$55 million is for what period of time?

14 A. April 1st until June 9.

15 MR. HOGAN: That's it.

16 MR. LIEBELER: Very good.

17 (Concluded: 11:27 a.m.)

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1 STATE OF HAWAII)

2 CITY AND COUNTY OF HONOLULU)

3 I, JOAN IZUMIGAWA, Notary Public in and for the
4 State of Hawaii, CSR No. 136, do hereby certify:

5 That on Monday, January 23, 2006, at 10:11 a.m.,
6 appeared before me THOMAS UENO, CPA, the witness
7 whose deposition is contained herein; that prior to
8 being examined, he was duly sworn to tell the truth,
9 the whole truth, and nothing but the truth in his
10 deposition;

11 That the deposition was reported by me in machine
12 shorthand at the time and place stated herein and was
13 thereafter reduced to writing under my supervision;
14 that the foregoing is a true and correct transcript
15 of the proceedings had.

16 I further certify that I am not attorney for any
17 of the parties hereto nor in any way interested in
18 the outcome of the pending cause.

19 Dated this 23rd day of January 2006 at
20 Honolulu, Hawaii.

21
22
23
24 Notary Public, State of Hawaii

25 My commission expires: August 18, 2006